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March 8, 2002

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
445 12th Street, S.W., Room TW-B204
Washington, D.C. 20554

Re: GN Docket No. 01-74 /
Television Channels 52-59

Dear Mr. Caton:

Transmitted herewith, on behalf of Pappas Telecasting of America, a California Limited Partnership, and Iberia Communications, LLC, are an original and four copies of their "Joint Petition for Reconsideration in the above-referenced proceeding.

Should any question arise concerning this matter, please communicate with this office.

Very truly yours,



Anne Goodwin Crump

Enclosures

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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

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MAR - 8 2002

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Reallocation and Service Rules for the) GN Docket No. 01-74
698-746 MHz Spectrum Band)
(Television Channels 52-59))

Directed to: The Commission

JOINT PETITION FOR RECONSIDERATION

PAPPAS TELECASTING OF AMERICA,
A CALIFORNIA LIMITED PARTNERSHIP

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March 8, 2002

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SUMMARY

Pappas Telecasting of California, a California Limited Partnership (“Pappas”) and Iberia Communications, LLC (“Iberia”) herein respectfully submit their Joint Petition for Reconsideration of the Commission’s *Report and Order*, FCC 01-364, released January 18, 2002. Pappas, through a series of applications and related petitions for rule making, presently seeks authorizations in the Channel 52-59 range for five communities. Iberia has a pending application to provide a first local service to the community of New Iberia, Louisiana, which application is now “cut-off.” Pappas and Iberia seek reconsideration of the Commission’s unjustified determinations as set forth in the *R&O* that no further NTSC authorizations would be granted in the Channel 52-59 range and that all pending petitions for new allotments within those channels will be dismissed.

The Commission should be mindful of its past promises to the broadcasters who have had pending applications and petitions on file since at least September 1996. The Commission may not turn away from its past enunciated policies of favoring introduction of new television service – especially first local service – and the promotion of new television networks without enunciating a rational basis logically connected to the ends hoped to be achieved. The Commission has failed to put forward such an explanation sufficient to justify its abrupt policy about-face.

Further, while Pappas and Iberia are aware of the constraints under which the Commission operates with regard to the Congressional mandate to clear the band for new services, the fact remains that the additional grants proposed would have little, if any, effect on the speed with which the transition could move. Nonetheless, the actions taken by the

Commission do not, in fact, appreciably further that end, but they do conflict with Congressional goals set forth in Section 309(l) of the Communications Act. Given the currently encumbered nature of the band, the tiny incremental addition of the new facilities proposed will have no practical effect on the ability of new services to be deployed.

Finally, it must be recognized that the auction for Channels 52-59 will likely be put off until 2006. Moreover, the DTV transition is certain to slip well beyond 2006. Until then, the public should not be denied new television service – in many cases first local transmission service. To fail to take this into account would leave much valuable spectrum lying fallow because of inaction for up to ten years. Pappas and Iberia respectfully maintain that the public interest, and Congressional mandate, require the Commission to reconsider its actions in the *R&O* as set forth herein.

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

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OFFICE OF THE SECRETARY

In the Matter of)
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698-746 MHz Spectrum Band)
(Television Channels 52-59))

Directed to: The Commission

JOINT PETITION FOR RECONSIDERATION

Pappas Telecasting of America, a California Limited Partnership ("Pappas") and Iberia Communications, LLC ("Iberia") hereby respectfully submit their Joint Petition for Reconsideration of the Commission's *Report and Order*, FCC 01-364, released January 18, 2002, in the above-captioned proceeding ("*R&O*"). In support thereof, the following is submitted:

I. Introduction

1. Pappas, through a series of applications and related petitions for rule making, presently seeks authorizations in the Channel 52-59 range for five communities, *i.e.*, Derby, Kansas (NTSC Ch. 54); Boynton Beach, Florida (DTV Ch. 57); Charleston, West Virginia (NTSC Ch. 55); New Castle, Pennsylvania (NTSC Ch. 56); and Owensboro, Kentucky (NTSC Ch. 57). Pappas has pending applications and is simultaneously herewith submitting amendments to pending rule making petitions for substitute channels for two of those communities (Charleston and Owensboro), in compliance with the Commission's directive in the *R&O*. In the remaining

communities (Boynton Beach, New Castle, and Derby) petitions for rule making to allot a new channel to provide first local television service will be necessary.

2. Iberia has a pending application to provide a first local service to the community of New Iberia, Louisiana, which application is now “cut-off.” No objections to the application were filed by the cut-off date. While that application originally specified a different channel (Channel 36), a DTV channel switch by an operator in a nearby market forced Iberia to specify Channel 53 pursuant to a channel substitution approved by the Commission. *See, Report and Order* in MM Docket No. 01-2, DA 01-857, released April 6, 2001. As set forth below, in order to preserve its application, Iberia is now forced again to alter its application by petitioning for a new channel (Channel 50) at an inferior site, jeopardizing the viability of what is already a risky “start-up” in a small, economically depressed market.

3. Accordingly, Pappas and Iberia seek reconsideration of the Commission’s abrupt and inequitable determinations as set forth in the *R&O* that no further NTSC authorizations would be granted in the Channel 52-59 range and that all pending petitions for new allotments within those channels will be dismissed.

II. Refusal to Grant Additional NTSC Authorizations Is an Inequitable Departure from Past Stated Policy

4. In the *R&O*, the Commission determined that it would dismiss all pending petitions for new channels in the Channel 52-59 band, but would allow the filing of new petitions for DTV channels within the core spectrum. The Commission also determined that parties with pending applications must amend their applications or seek substitute channels to specify either DTV facilities on any channel up to Channel 58 or an analog channel within the core. These decisions

fly squarely in the face of previous actions and pronouncements made by the Commission and represent an abrupt about-face in Commission policy without any substantial basis.

5. The Pappas applications and related rule makings and the Iberia application were each filed on or prior to September 20, 1996, the cut-off date established by the Commission in its *Sixth Further Notice of Proposed Rule Making*, 11 FCC Rcd. 10968, 10992, ¶60 (1996). In permitting such filings, the Commission expressed its willingness to consider these new broadcast services and its belief that such services would not adversely impact the DTV allotment scheme that it was developing. *Id.* This position of the Commission was restated when it issued its *Sixth Report and Order*, 12 FCC Rcd. 14588 (1997), where it concluded that it would protect those filings so as to “ensure that parties who have begun to invest in new stations . . . may continue to pursue their ongoing station development prospects.” (at Para.112). Further, after dividing the total spectrum to be reclaimed into the upper 700 MHz band (Channels 60-69) and lower 700 MHz band (Channels 52-59), the Commission explicitly encouraged applicants and petitioners for new channels to move from the upper 700 MHz band and from channels conflicting with DTV allotments and to specify channels below Channel 60, including channels in the Channel 52-59 band. *Public Notice*, “Mass Media Bureau Announces Window Filing Opportunity or Certain Pending Applications and Allotment Petitions for New Analog TV Stations,” 14 FCC Rcd 19559 (1999). Once again, the Commission gave no indication whatsoever that specification of a channel in the lower 700 MHz band would preclude grant of an analog application, and many parties, including Pappas and Iberia, relied upon this invitation.

6. In addition, the need to protect the newly created Class A television stations in many instances compelled a move to the lower 700 MHz band. Because Class A stations were limited

to core channels, and because new NTSC proposals were not protected from Class A proposals (*see, e.g., Public Notice, "Window Filing Opportunity for Certain Pending Applications and Allotment Petitions for New Analog TV Stations Extended to July 15, 2000*, 15 FCC Rcd 4974 (2000)) NTSC applicants often had no choice but to seek replacement channels outside of the core channels. As stated above, the Commission gave no indication whatsoever that proposals in the Channel 52-59 range would be unacceptable, and in fact, reaffirmed repeatedly that they would be acceptable.

7. As recently as the *Notice of Proposed Rule Making*, FCC 01-91, released March 28, 2001 ("*NPRM*"), in the instant proceeding, the Commission mandated that there should be no suspension of the processing of pending applications specifying channels in the lower 700 MHz band, aside from those for Channel 59. *NPRM* at ¶24. The Commission has further acknowledged that the overwhelming majority of commenters addressing this issue favored the grant of pending requests for authorization in this band. *R&O* at ¶ 42. Thus, a consistent line of past Commission actions and statements led petitioners to believe that new analog stations could be authorized in the lower 700 MHz band, and the weight of comments in the instant proceeding supported such grants. Petitioners relied on these Commission pronouncements, spending hundreds of thousands of dollars on legal and engineering costs and business planning, aimed at expedited inauguration of new analog service in the lower 700 MHz band.

8. Nonetheless, in the *R&O*, the Commission abruptly changed course. It determined that no new analog authorizations or new DTV allotments would be granted in the lower 700 MHz band because such additions would not be consistent with the DTV transition at its current stage. *R&O* at ¶44. The first rationale offered for this sudden change is that new licensees

might have only a limited time in which to operate as an analog station before being required to convert to digital, and the second is that the requested grants would be inconsistent with the purposes of the Balanced Budget Act of 1997. *Id.* Neither of these bases for the Commission's decision can withstand close scrutiny, however. Commissioner Kevin J. Martin criticized the reasoning offered by the Commission. *See* Separate Statement of Commissioner Kevin J. Martin, attached to the *R&O*. He noted that grant of the authorizations requested "would have resulted in substantial consumer benefits with little-to-no harm to the digital transition or the ability to auction the spectrum at issue." Separate Statement of Commissioner Martin at 1.

9. The Commission's conclusion that new analog licensees would have only a brief time to operate is speculative at best, however. It is not now known either when such applications might be granted or how quickly the new facilities might be constructed. Further, the date of completion of the DTV transition also cannot be ascertained at this time, but is generally acknowledged to be likely to slip to a date well beyond 2006. Essentially, the rationale which the Commission has offered substitutes its own business judgment for that of individual applicants. It has failed to explain how service – first local service in many cases – for even a limited time before moving to DTV would not better serve the public interest than no service at all. The Commission is not, or should not be, in the business of making such paternalistic judgments to protect broadcasters from themselves.

10. Another rationale offered by the Commission is that the Balanced Budget Act of 1997 requires the recovery of analog spectrum for new services. This is correct in principle, but as the *R&O* repeatedly states, that recovery was to be keyed to the DTV transition (*R&O* at ¶¶37-38), not forced upon petitioners at an earlier time when the lower 700 MHz band remains

encumbered by numerous stations. It must also be noted that the Commission has stated that it will allow applicants to amend their applications to specify DTV operation on Channels 52 to 58. DTV operation will encumber this spectrum during DTV transition just as much as NTSC operation would, as six MHz of spectrum are allotted in either case. Further, there are numerous incumbents on the band as well. They will remain on it indefinitely during the transition. Thus, it is clear that the Commission's action will not actually ensure recovery of spectrum. Rather, the Commission has inexplicably, and suddenly, reversed its oft-stated previous position of encouraging new stations and instead seeks to preclude any new analog stations.¹

11. The Commission has articulated no reasoned basis for this about-face, as the rationale offered does not withstand close scrutiny. Thus, such action constitutes arbitrary and capricious decision-making which should be reversed. Absent Congressional mandate as articulated in Section 309(l) of the Communications Act, it is certainly within the Commission's authority to change its policies, "but it must explain why it is reasonable to do so." *Fox Television Stations, Inc. v. FCC*, D.C. Circuit, No. 00-1222, decided February 19, 2002 at Section III(A)(3), citing *Motor Vehicle Mfrs. Assn's v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983). It has become axiomatic that "an agency changing its course must supply a reasoned analysis." *Telecom. Research and Action Ctr. v. FCC*, 801 F.2d 501, 518 (D.C. Cir. 1986). *See also, Reuters, Ltd. v. FCC*, 781 F.2d 946, 950 (D.C. Cir. 1986) (warning the Commission to avoid "*ad hoc* departures from [its] rules, even to achieve laudable aims"). Since the Commission has not demonstrated how the reasons advanced for its decision will promote

¹ As Commissioner Martin points out, "more reasonable options" could have been adopted, "such as requiring a switch to digital by a date certain." Separate Statement at 1.

the achievement of its stated goals, it has not established the “rational connection between the facts found and the choice made” that is required. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 158 (1962). Thus, the Commission’s action cannot be supported.

12. The Commission has led applicants and petitioners to expect that their applications and petitions would be processed in accordance with normal procedures, and those applicants and petitioners have acted in reliance upon the Commission’s statements. Now, however, the Commission’s action has, in essence, pulled the rug out from under such applicants and petitioners, simultaneously both dashing reasonable expectations and foreclosing new service to the public. Commissioner Martin recognizes that the public interest would benefit from receiving service in the near term from the proposed stations, and, as set forth below, there would be no appreciable public interest detriments. Therefore, the Commission should reconsider its decision and move ahead with processing and grant of both analog and digital applications and petitions in the lower 700 MHz band.

III. Actions in the *R&O* Conflict with Congressional Mandates

13. As set forth above, the Commission’s actions in the *R&O* are not necessary to satisfy the Congressional requirement for recovery of spectrum and do not, in fact, appreciably further that end. Moreover, the actions conflict with Congressional goals set forth in the Balanced Budget Act of 1997. Therein, Section 309(l) was added to the Communications Act of 1934, as amended, by Section 3002(a) of the Balanced Budget Act. Section 309(l) directs the Commission to “waive *any* provisions of its regulations necessary” to permit settlements between mutually exclusive broadcast applications to go forward during the 180-day period beginning on the date of the enactment of the Balanced Budget Act. 47 U.S.C. §309(l) (emphasis added). The

obvious Congressional intent in adopting this section was to encourage such settlements and new service to the public. By the same token, it clearly would be contrary to Congressional intent for the Commission to enact new regulations which would undermine this goal and could prevent settlements reached during the Congressionally mandated window from going forward.

14. As the Commission is aware, there are a number of pending universal settlement agreements, filed during the Congressionally established settlement window, pursuant to which applicants have specified channels in the Channel 52-59 band, including the Iberia application and the Pappas application at Owensboro. It is clear that the determinations made by the Commission in the *R&O* could well sabotage the ability of such agreements to go forward to fruition. Because the Commission has indicated that it no longer will be possible for an applicant to obtain a new NTSC authorization in the Channel 52-59 band, it no longer will be possible for the proposed surviving applicants to obtain the facilities for which they bargained. Rather, any construction permit which could be received would specify facilities substantially different from those which were the subject of the agreement. This very basic change in the underlying subject matter of the agreement clearly will substantially impede parties from successfully carrying out the settlement agreements which were entered into during the Congressional settlement window.

15. In enacting the settlement window, Congress clearly recognized that parties had invested considerable time, effort, and money to that point in attempting to bring new service to the public. The actions of the Commission now undermine the ability of parties to realize the benefits of those investments and potentially deprive such parties of the benefits of the settlements reached. Such actions are contrary to the Balanced Budget Act of 1997 and to the due process of law. Accordingly, the determinations made in the *R&O* cannot be

supported.

IV. Allowing Petitioners' Proposals to Proceed Would Have Minimal Adverse Impact

16. While the Commission has previously been pressured by events, sometimes beyond its own control, to clear the Channel 52-59 band, the current rush to eliminate all new allotments and all modified analog allotments in this channel band is unnecessary. It is recognized that the Balanced Budget Act of 1997 required the Commission to reclaim certain spectrum, including the lower 700 MHz band, for auction for new services. Nonetheless, the President's budget proposal has advocated postponement of that auction from its currently scheduled date later this year to 2006. Given the economic reality that only a low monetary return could be expected from an earlier auction due to the already encumbered nature of the spectrum, such a postponement is eminently reasonable and therefore likely to be adopted. With a postponement of the spectrum auction, there would no longer be any pressing need for the band to be cleared immediately.

17. Even more important is the fact that the band is already significantly encumbered with existing television operations and new DTV operations which must be protected. The Commission itself previously recognized that the lower 700 MHz band (Channels 52-59) presented a much more difficult situation than Channels 60-69 because the lower band was significantly more encumbered with TV operations. *See, R&O* at ¶¶38-38. Therefore, additional grants would have a relatively low overall impact. As reflected in the *R&O*, at the time of the *NPRM* there were only 57 pending NTSC applications and allotment petitions, and some of them were dismissed prior to the date of the *R&O*. Even if as much as 50 percent of those applications and allotments were granted (which is highly unlikely) that would only add slightly more than 10% to the current total number of authorizations in the Channel 52-59 band, a clearly minimal

impact.

18. The current usage picture on channels 52-59 presents a very different scenario than that previously before the Commission when it looked at the upper 700 MHz band. Here, the addition of a few new services would represent only a slight incremental addition to the current overall usage of the frequencies. For that reason, it is unlikely that grant of new authorizations, whether analog or digital, on Channels 52-59 would have any significant impact on the timing of the institution of new, non-broadcast services in that band. The Commission has recognized that the greater level of current incumbency will make it far more difficult for new services to operate prior to the end of DTV transition in the lower 700 MHz band as opposed to the upper 700 MHz band. *See, R&O* at ¶38. Thus, adding a relatively small number of new facilities would not slow the introduction of new services in any appreciable manner.

19. Moreover, if the Commission does not grant new authorizations and allotments in the band, the spectrum will remain unused for a number of years in the future, as it has been in the past. Given the fact that new services are unlikely to be introduced over any wide area until the end of DTV transition, and given the fact that the transition is almost certain to be delayed well beyond 2006, the Commission's refusal to grant new analog authorizations and make new allotments in the lower 700 MHz band will mean that this grossly inefficient non-use of spectrum will continue for a substantial period. On the other hand, if analog broadcasting and new DTV allotments are allowed at this time, the public will receive the benefit of new television service, including a number of new first local television services. As pointed out by Commissioner Martin, "[s]pectrum that has been lying fallow would be put to productive use more quickly." Separate Statement at 1.

20. As more fully set forth below, in the case of some analog applicants such as Iberia, the market in question simply will not support a DTV facility at this time. Due to the greater expenses involved in constructing a DTV facility and the lack of receivers to view DTV programming in the market, it would be economic suicide for an applicant to go forward with a DTV-only facility in a number of these small markets. Accordingly, the now vacant spectrum which is the subject of pending applications will remain vacant. In light of the negligible effect that the grant of construction permits for a small number of new stations in the lower 700 MHz band would have on incumbency within the band, it is clear that the greater public interest detriment lies in requiring valuable spectrum to remain idle and communities to remain unserved. Such a result is plainly contrary to the core purpose of the Communications Act of 1934, as amended, which established the FCC so as to “provide a fair, efficient, and equitable distribution of radio service” to the communities of the United States. 47 U.S.C. §307(b).

21. On the other hand, in some communities which are subjects of long-pending petitions for rule making to allot new channels such as those filed by Pappas, a new station might be able to survive as a DTV-only facility. While Pappas continues in its view that the addition of an analog channel would be preferable in terms of immediate availability of service to a greater number of people, the allotment of a new DTV-only facility in the Channel 52-58 range also would provide public service benefits. Indeed, the addition of such DTV-only channels would be likely to aid in the advance of the DTV transition rather than to slow it. The Commission has itself recognized that the new DTV service which would result from deployment of new DTV facilities on channels for which analog applications are now pending would promote the DTV transition. *R&O* at ¶45. The same rationale applies equally to requests for new channels on

which such services may be deployed. New DTV-only stations not only would provide a greater quantity of DTV programming in a market, but that programming would be uniquely broadcast in the DTV format. Accordingly, viewers in the market would be encouraged to purchase DTV receivers, and those purchases in turn would improve the profitability of DTV in general. If such petitions for rule making are not granted, however, the spectrum will remain fallow, and communities will remain unserved or underserved. Clearly, any negative impact of adding an incrementally insignificant amount of new allotments in the lower 700 MHz band is more than outweighed by the benefits to be received both in terms of advancement of DTV and service to the public.

V. Short Spacing and Technical Waivers of Limited Impact

22. In examining requests for short-spacing in connection with proposed NTSC allotments, it must be remembered that the pending applications and rule makings that have been on file at least since September of 1996 represent the end of the analog line. Despite this fact, there remains a reluctance to allow short-spaced allotments, even in cases where there is a complete demonstration that no interference would occur. While Pappas and Iberia recognize that, at an earlier time, the Commission wished to maintain the integrity of its analog allotment system, the 1996 cut-off date marked the end of the road. In view of the limited number of analog applications remaining, no meaningful future precedent could be set, and the Commission should continue forward with the consideration and processing of those few remaining applications and proposals on their merits. When the evidence shows that a short spacing, either because of a directional array or intervening terrain will not cause interference, a rule making proceeding should not be rejected. To act otherwise would be contrary to the public interest and

unreasonably require a rigid adherence to “outdated form” over the genuine substance of broadcast service to the public.

23. Likewise, in the case of proposed DTV facilities, it must be recognized that any facilities authorized in the lower 700 MHz band will necessarily be of a temporary nature. Once the end of the DTV transition comes, it will be necessary for those stations to re-locate to new channels. Accordingly, as long as it is demonstrated that a proposed new DTV facility to operate between Channels 52 and 58 would not cause actual interference, an authorization for that facility should be granted. Once again, no meaningful precedent could be created by such a grant, since it would be based upon the knowledge that the grant would be temporary, and to act otherwise would elevate form over real substance.

VI. Importance of Local Television Service and First Local Television Service

24. It cannot be ignored that the denial of applications and new allotments will deny new local television service to the public. The Commission and Congress, however, have previously made it clear that they seek to avoid unnecessary disruption of local television service to the public. For it is local service that represents --- or at least should represent --- the greater concern to the Commission. Notwithstanding increased reception service from cable or satellite today, the very important fact remains that a family in New Iberia or Owensboro or Fresno is not going to be alerted to violent, life-threatening weather conditions, dangerous traffic situations, or government and school closings by watching WGN, WTBS or the fifth movie channel. Under Section 307(b) of the Communications Act, the Commission has the obligation to protect such sources of local information or “ – when possible – provide for new service.”

25. A number of the applications and allotment petitions now pending represent the

opportunity to provide first local television service to currently unserved communities. In his Separate Statement, Commissioner Martin expressed continuing emphasis on the importance of providing first local service. Separate Statement at 1. Grant of these applications and petitions thus would promote the objective set forth in Section 307(b) of the Communications Act of providing a fair, efficient, and equitable distribution of television broadcast stations among the various states and communities. 47 U.S.C. §307(b). *See, FCC v. Allentown Broadcasting Co.*, 349 U.S. 358, 359-62 (describing goal of Section 307(b) to “secure local means of expression”). Moreover, ever since the earliest days of television, the goal of providing a first local television transmission service to each community has been one of the highest priorities in making television allotments. *Sixth Report and Order on Television Allocations*, 41 FCC 148 (1952). Indeed, this goal ranks second only to the goal of providing a first television reception service. *Id.* at 167. Clearly, therefore, the provision of a first local television station for the communities involved is a factor of the highest priority. If the Commission is to turn away from this long-held policy, it must provide an adequate, reasoned explanation for such a departure, and such a course change requires a reasoned analysis beyond that which might be required if the Commission had not adopted such a policy in the first instance. *Motor Vehicle Mfrs. Assn’s v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42.

26. In addition, it is clear that the factors which have long supported the Commission’s policy with regard to first local service still obtain. Even with the proliferation of other media, viewers continue to rely upon local television stations for local news, information, opinions, and discussion of local issues. If the pending applications and petitions are not granted, then the communities in question will be denied the opportunity to have such a local television outlet,

perhaps forever. While it is theoretically possible that, at some future time, a DTV channel within the core could be allotted to such communities, it is clear that channel availability is likely to require that any such proposal wait until the end of DTV transition. Thereafter, applicants could await and participate in an auction for that facility. Nonetheless, this possibility clearly lies many years in the future. In the interim, the affected communities will be denied local television service, and the proposed channels will continue to lie fallow. This result clearly would be contrary to the public interest. The public interest factors more specific to the individual communities for which Iberia and Pappas seek specific reconsideration are set forth as follows.

VII. New Iberia, Louisiana

27. Iberia originally filed an application for Channel 36 in 1996 on the NTSC cut-off date established in the *Sixth Further Notice*. (File No. BPCT-960612KF.) Because the community was within the New Orleans ATV “freeze area,” a waiver was required and requested. The Commission’s initial DTV Table would have precluded the use of Channel 36 at New Iberia, but the Table ultimately adopted in 1998 accommodated the Channel 36 proposal. A mutually exclusive application was also filed. A settlement agreement was eventually reached between the applicants and submitted to the Commission in 1998.

28. Subsequently, however, on the eve of an anticipated cut-off notice for Iberia’s application, the permittee of WWL-DT, New Orleans, petitioned for rulemaking to utilize DTV Channel 36 in lieu of its assigned Channel 30. There was no way for Iberia’s Channel 36 proposal to accommodate this proposal, nor did there seem to be any reasonable prospect of challenging it, given the Commission’s oft-pronounced preference for digital proponents. Consequently, Iberia was compelled to select another channel.

29. This proved to be a daunting task. Due to Louisiana's topography (e.g., large areas of water), site access, and FAA problems were difficult to overcome. Importantly, analog and digital spacing and interference issues were compounded by the creation by Congress of the new Class A LPTV service, which required protection for formerly secondary services. In order to circumvent the Class A problem, which existed only inside the core, and in response to the Commission's repeated explicit invitations to move into the lower 700 MHz band, Iberia filed a petition for rule making proposing substitution of Channel 53 on March 3, 2000. In response, the Commission released a Notice of Proposed Rule Making, proposing the Channel 53 substitution, and later a Report and Order modifying the Table of Allotments. That Report and Order ordered Iberia to submit an application specifying Channel 53 in lieu of Channel 36 within 45 days. (See DA 01-857, released April 6, 2001.)

30. Iberia did so, and later amended with detailed engineering showing to maximize the proposed facilities consistent with Commission and FAA restrictions. On November 30, 2001, the staff released a cut-off notice regarding Iberia's Channel 53 application. The cut-off date -- January 9, 2002 -- passed with no petitions to deny or objections filed.

31. As set forth at length in Iberia's prior pleadings, which persuaded the Commission to accommodate a channel for New Iberia, Iberia's proposal to bring a first local television service to New Iberia has been enthusiastically supported by numerous community, state and regional leaders. They ranged from the Honorable Representative Billy Tauzin and Senator John Breaux to the community's mayor, state senators and representatives, and the President of the NAACP. These leaders share Iberia's concern that this culturally and ideologically distinct community and its parish are isolated from communications outlets in larger markets, miles distant from New

Iberia. A new video voice would meet the critical need for local news, emergency coverage, and forums on issues of unique local importance.

32. A digital service in New Iberia is not a feasible alternative at this stage of the DTV transition. Cable penetration in the New Iberia area is quite low at approximately 65%, and digital receiver/equipment penetration in this poor², mostly rural area is minuscule. To expect that a start-up TV operator, unable to reach more than a third of its audience not served by cable, would survive until a market afflicted with this degree of poverty transitions to digital is unreasonable and unrealistic. Thus, the option for Iberia to build a digital facility in 2002 is a "Hobson's choice." (See Commissioner Martin's Concurring Statement.)

33. Accordingly, Iberia has once again gone back to the "drawing board" to locate an analog channel inside the core. It has found Channel 50 and is filing today yet another petition for rule making to substitute that channel at a site near New Iberia. However, that option is plainly not a preferable one and in no way vitiates the unfairness of the draconian election imposed on the long-suffering applicant here. Because of NTSC spacing and DTV interference restrictions, and land use issues, Iberia's Channel 50 facilities will serve only 496,499 persons. This is 24% fewer persons than would have been served with its proposed Channel 53 facilities. Iberia's tower will be small, much of Iberia's Channel 50 signal will be wasted over water, and its city-grade coverage will not encompass Lafayette, imposing a high hurdle on revenue

² The median household effective buying income for Iberia Parish was only \$26,270 in 1999, and 1998 Per Capita Personal Income was \$22,930. (See Iberia Industrial Development Foundation data, March 4, 2002.) According to the U.S. Department of Commerce Consumer Income Reports for 2000, the national median household income was \$42,148, and Louisiana's, fourth lowest in the country, was \$32,006. Louisiana's poverty level in 2000 was among the highest in the nation.

generation in this important larger market.

34. After six years of efforts to meet the Commission's "moving target" requirements, there is no justifiable basis for this latest burden on the initiation of a first local service. As Commissioner Martin stated, fallow spectrum could be activated, local needs could be served, the digital transition could continue unimpeded, and Congress' mandate to auction spectrum could be achieved -- all consistent with Iberia's modest goal of a start-up first local TV service in a small city.

VIII. Boynton Beach, Florida

35. Pappas has previously proposed the allotment of DTV Channel 57 to Boynton Beach, Florida. *See* Amendment to Petition for Rule Making, filed July 17, 2000. As set forth therein, the proposed allotment would provide the first local television service to the community of Boynton Beach, and would bring a new television broadcast service to well over four million people. Pappas hereby adopts and incorporates by reference the arguments set forth therein. Furthermore, as demonstrated in the attached Engineering Statement (see Exhibit 1), the proposed facility would not cause prohibited, harmful interference to any NTSC or DTV facility.

36. As an additional benefit, the grant of the proposed allotment would promote the emergence of new national television networks by providing an additional broadcast outlet in a top 100 television market with which such a network could establish a primary affiliation. Such a grant is clearly consistent with the Commission's long-standing policy of promoting the development of new networks. *See* Report on Chain Broadcasting, Commission Order No. 37, Docket 5060 (May 1941) at 88 ("Report on Chain Broadcasting"); Amendment of Part 73 of the Commission's Rules and Regulations with Respect to Completion and Responsibility in Network

Television Broadcasting, 25 F.C.C. 2d 318, 333 (1970); Fox Broadcasting Co. Request for Temporary Waiver of Certain Provisions of 47 C.F.R. §73.658, 5 FCC Rcd. 3211, 3211 and n. 9 (1990), citing Network Inquiry Special Staff, New Television Networks: Entry, Jurisdiction, Ownership And Regulation (Vol. 1 Oct. 1980), waiver extended, 6 FCC Rcd 2622 (1991). Thus, it is clear that grant of the Pappas proposal for the allotment of DTV Channel 57 at Boynton Beach would serve the public interest.

37. Furthermore, as set forth above, the allotment of a DTV-only channel in a top 100 market would further, rather than hinder, the DTV transition. The addition of new and uniquely DTV programming will spur public interest in DTV in general and the purchase of DTV receivers. That interest will advance the transition as public demand for DTV increases. Accordingly, Pappas hereby seeks reinstatement and grant of its amended petition for rule making and the amendment of the DTV Table of Allotments to allot Channel 56 to Boynton Beach.

IX. New Castle, Pennsylvania

38. Pappas has previously proposed the allotment of NTSC Channel 56 to New Castle. *See* Amendment to Petition for Rule Making, submitted by Pappas on July 17, 2000. As set forth therein, the proposed allotment would provide the first local television service to the community of New Castle and would bring a new television broadcast service to well over three million people.

39. In light of the Commission's dismissal of its NTSC proposal in the *R&O*, Pappas has now determined that DTV Channel 56 could be allotted to New Castle. As demonstrated in the attached Engineering Statement (see Exhibit 2), this proposed facility would not cause

prohibited, harmful interference to any NTSC or DTV facility. While the immediate benefits would not be as great as those of an NTSC facility, the substantial public interest in a first television service will be served. Furthermore, the allotment would provide the opportunity for a new entrant to come into a top 100 television market, and it also would promote the emergence of new television networks, as set forth above. For all of these reasons, Pappas seeks reinstatement of its petition for rule making, grant of its proposal set forth herein to allot DTV Channel 56 to New Castle, and amendment of the DTV Table of Allotments accordingly.

X. Conclusion

40. In sum, Pappas and Iberia urge the Commission to reconsider its actions in the *R&O* and to move forward with grant of both NTSC and DTV applications and allotments within the Channel 52-58 range. While Pappas and Iberia are mindful of the constraints under which the Commission operates with regard to the Congressional mandate to clear the band for new services, the fact remains that the additional grants proposed would have little, if any, effect on the speed with which the transition could move. Given the currently encumbered nature of the band, the tiny incremental addition of the new facilities proposed will have no practical effect on the ability of new services to be deployed.

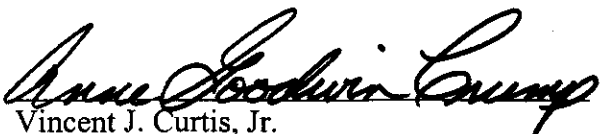
41. Furthermore, the Commission should be mindful of its past promises to the broadcasters who have had pending applications and petitions on file since at least September 1996 and the Congress' own mandates to the Commission in Section 309(l). The Commission may not turn away from its past enunciated policies of favoring introduction of new television service – especially first local service – and the promotion of new television networks without enunciating a rational basis logically connected to the ends hoped to be achieved. The

Commission has failed to put forward such an explanation sufficient to justify its abrupt policy about-face.

42. Finally, it must be recognized that the auction for Channels 52-59 will likely be put off until 2006. Moreover, the DTV transition is certain to slip well beyond 2006. Until then, the public should not be denied new television service which – in many cases – would be the first local transmission service. To fail to take this into account would leave much valuable spectrum lying fallow because of inaction for up to ten years. Pappas and Iberia respectfully maintain that the public interest and existing law require the Commission to reconsider its actions in the *R&O* as set forth herein.

Respectfully submitted,

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March 8, 2002

EXHIBIT 1

Engineering Statement
Boynton Beach, FL
Channel 57 DTV
Amendment to Proposed Rulemaking
By WES Broadcast Consultants

Boynton Beach, FL Channel 57 DTV seeks continued support and reconsideration under the current filing window. Channel 57 is currently short spaced to two NTSC stations Channel 61 WFGC-TV and a minus fifteen Adjacent Channel 42 WXEL-TV.

Exhibit FLR-1 demonstrates 0 interference to WFGC-TV's current facility as well as a current CP MOD on file.

Exhibit FLR-2 demonstrates 0 interference to WFGC-TV's most currently filed application for a power increase.

There is no FLR exhibit for WXEL-TV because it is not predicted to receive any interference as a minus 15 Adjacent channel and OET 69 does not calculate any interference for that same reason.

Exhibit-FLR-1
Ch 57 DTV Boynton Beach, FL
Amendment to Pending Rulemaking
prepared by Wes Broadcast Consultants

Ch 57 DTV N LAT 26-34-37 W LON 80-14-32 ERP: 540 kW AGL:468.47m GMSL:4m RCMSL:472.47m

Callsign	City	Class	Status	ERP	Sep Type	Status	Dist	Prot	Clearance	D/U	Rx Gain	Rx F/B	Zone	Band	Ch#	Adj	Matrix	Svc Contour	Svc Strength
WFGC	PALM BEACH	NTSC LIC		2400	D/M	Clean	21	97	-76	-34	0	6	3 UHF	61 Z	T+4	LR	F(50,50)		64

Population before the addition of Ch 57 to the database not affected by terrain losses:1,218,734 persons

Population lost to NTSC before the addition of Ch 57: 0 persons

Population after the loss to NTSC: 1,218,734 persons

Population after the addition of Ch 57 to the database: 1,218,734 persons

Population lost to NTSC with Ch 57: 0 persons

Percentage of population lost with Ch 57: 0.0 %

Exhibit-FLR-2
 Ch 57 DTV Boynton Beach, FL
 Amendment to Pending Rulemaking
 prepared by Wes Broadcast Consultants

Ch 57 DTV N LAT 26-34-37 W LON 80-14-32 ERP: 540 kW AGL:468.47m GAMSL:4m RCAMSL:472.47m

Callsign	City	Class	Status	ERP	Sep Type	Status	Dist	Prot	Clearance	D/U	Rx Gain	Rx F/B	Zone	Band	Ch#	Adj	Matrix	Svc Contour	Svc Strength
WFGC	PALM BEACH	NTSC	APP	400	D/M	Clean	3.6	97	-93.4	-34	0	6	3	UHF	61	Z T+4	LR	F(50,50)	64

Population before the addition of Ch 57 to the database not affected by terrain losses:2,254,572 persons

Population lost to NTSC before the addition of Ch 57: 0 persons

Population after the loss to NTSC: 2,254,572 persons

Population after the addition of Ch 57 to the database: 2,254,572 persons

Population lost to NTSC with Ch 57: 0 persons

Percentage of population lost with Ch 57: 0.0 %

WES Broadcast Consultants.

DECLARATION

I, Pete E Myrl Warren, III, declare and state that I am a Certified Broadcast Engineer, by the National Association of Radio and Television Engineers, and my qualifications are a matter of record with the Federal Communications Commission, and that I am an engineer in the firm of WES Broadcast Consultants and that the firm has been retained to prepare an engineering statement on behalf of Pappas Telecasting of America, a California Limited Partnership.

All facts contained herein are true to my knowledge except where stated to be on information or belief, and as to those facts, I believe them to be true. All Exhibits were prepared by me or under my supervision. I declare under penalty of perjury that the foregoing is true and correct.



Pete E Myrl Warren, III

Executed on the 7th day of March 2002

EXHIBIT 2

Engineering Statement
New castle, PA
Channel 56 DTV
Amendment to Proposed Rulemaking
By WES Broadcast Consultants

New Castle, PA Channel 56 NTSC seeks to Amend its current Rulemaking proposal on Channel 56 NTSC to DTV Channel 56 with an ERP of 125.89 kW Digital using a Dielectric Peanut pattern with it's orientation shown in Exhibit ANT-1. Channel 56 DTV will not change location or RCAMSL. New Castle, PA DTV Channel 56 meets and maintains the proper City of License Coverage required. New Castle Channel 56 DTV is Short spaced to one NTSC facility and one DTV facility.

Exhibit FLR-1 demonstrates protection to NTSC Channel 53 WPGH-TV. The amount of interference to WPGH-TV Channel 53 is 0 percent.

Exhibit FLR-2 is run against the maximized DTV facility of WTOV-DT Channel 57 and demonstrates protection to that facility. The amount of interference to WTOV-DT Channel 57 is .12 percent which is less than de minimus.

Exhibit FLR-3 demonstrates protection to WTOV-TV Channel 57 which is WTOV-DT's Digital Allotment. The amount of interference to WTOV-TV Channel 57 is .40 percent which is below the de minimus standard.

Exhibit FLR-1
Ch 56 DTV New Castle, PA
Amendment to Pending Rulemaking
prepared by Wes, Inc. Broadcast Consultants

Ch 56 DTV N LAT 40-59-58 W LON 79-59-31 ERP: 125.89 kW AGL:315m GMSL:413m RCMSL:728m

Callsign	City	Class	Status	ERP	Sep Type	Status	Dist	Prot	Clearance	D/U	Rx Gain	Rx F/B	Zone	Band	Ch#	Adj	Matrix	Svc Contour	Svc Strength
WPGH-TV	PITTSBURGH	NTSC	LIC	2340	D/M	Clean	56	81	-24.9	-33	0	6	1	UHF	53	+ T-3	LR	F(50,50)	64

Population before the addition of Ch 56 to the database not affected by terrain losses: 2,151,537 persons
Population lost to NTSC before the addition of Ch 56: 4,593 persons
Population after the loss to NTSC: 2,146,944 persons
Population after the addition of Ch 56 to the database: 2,146,944 persons
Population lost to NTSC with Ch 56: 0 persons
Percentage of population lost with Ch 56: 0.0 %

Exhibit FLR-2
 Ch 56 DTV New Castle, PA
 Amendment to Pending Rulemaking
 prepared by Wes, Inc. Broadcast Consultants

Ch 56 DTV N LAT 40-59-58 W LON 79-59-31 ERP: 125.89 kW AGL:315m GAMSL:413m RCAMSL:728m

Callsign	City	Class	Status	ERP	Sep Type	Status	Dist	Prot	Clearance	D/U	Rx Gain	Rx F/B	Zone	Band	Ch#	Adj	Matrix	Svc Contour	Svc Strength
WTOV-DT	STEUBENVIL	DTV	CP	210	D/M	Clean	83	110	-26.8	-26	10	14	1	UHF	57	A+1	LR	F(50,90)	41

Population before the addition of Ch 56 to the database not affected by terrain losses: 2,285,718 persons
 Population lost to NTSC before the addition of Ch 56: 4,654 persons
 Population after the loss to NTSC: 2,281,064 persons
 Population after the addition of Ch 56 to the database: 2,278,151 persons
 Population lost to NTSC with Ch 56: 2,913 persons
 Percentage of population lost with Ch 56: 0.12 %

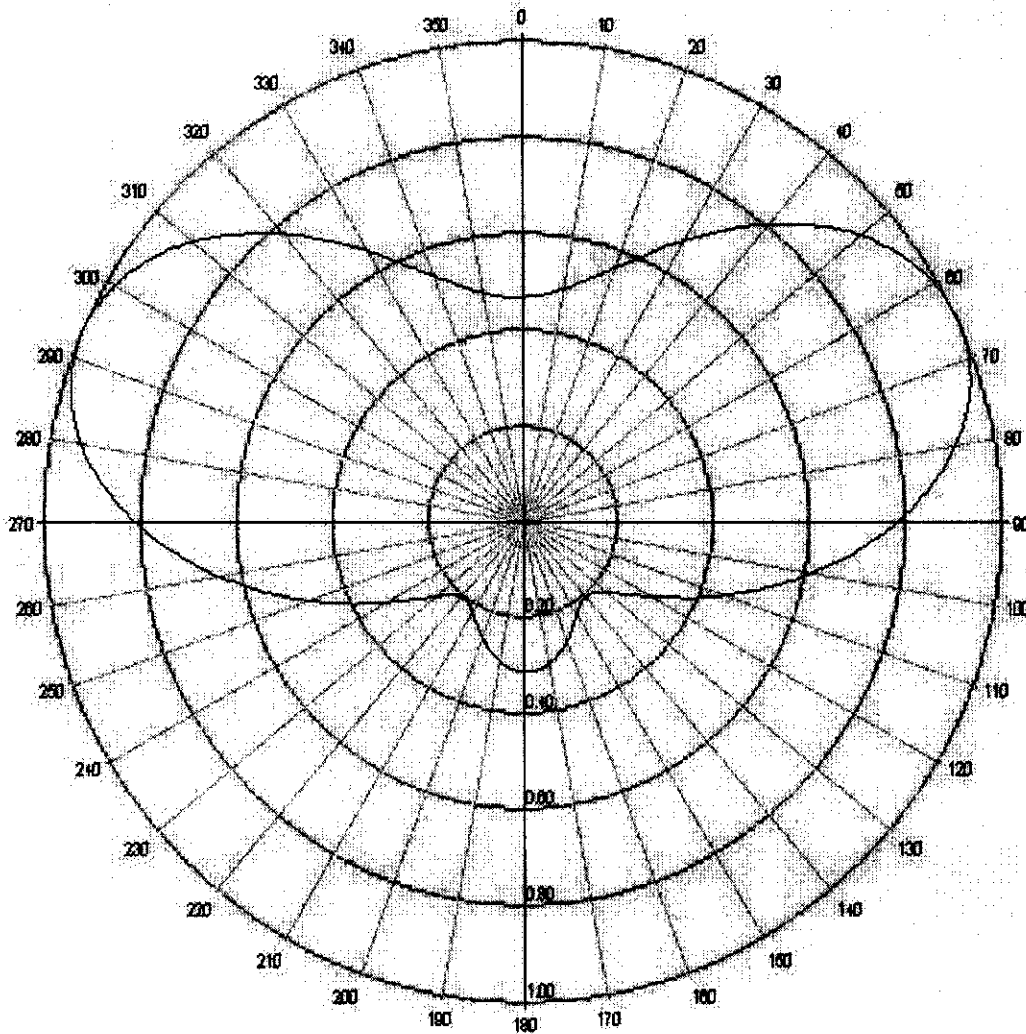
Exhibit FLR-3
Ch 56 DTV New Castle, PA
Amendment to Pending Rulemaking
prepared by Wes, Inc. Broadcast Consultants

Ch 56 DTV N LAT 40-59-58 W LON 79-59-31 ERP: 125.89 kW AGL:315m GAMSL:413m RCAMSL:728m

Callsign	City	Class	Status	ERP	Sep Type	Status	Dist	Prot	Clearance	D/U	Rx Gain	Rx F/B	Zone	Band	Ch#	Adj	Matrix	Svc Contour	Svc Strength
WTOV-TV*	STEUBENVIL	DTV	LIC	1000	D/M	Clean	83	110	-26.8	-26	10	14	1	UHF	57	A+1	LR	F(50,90)	41

Population before the addition of Ch 56 to the database not affected by terrain losses: 2,943,225 persons
 Population lost to NTSC before the addition of Ch 56: 17,964 persons
 Population after the loss to NTSC: 2,925,261 persons
 Population after the addition of Ch 56 to the database: 2,913,309 persons
 Population lost to NTSC with Ch 56: 11,952 persons
 Percentage of population lost with Ch 56: 0.40 %

**Exhibit ANT-1 New Castle, PA Channel 56 DTV Amendment to proposed Rulemaking
prepared by WES Broadcasting Consultants**



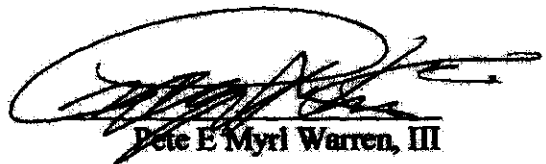
Azim	RelFS ERP [W]	dBk	Azim	RelFS ERP [W]	dBk	Azim	RelFS ERP [W]	dBk	Azim	RelFS ERP [W]	dBk
0.0	0.467	27.456	14.386	90.0	0.782	76.986	18.864	180.0	0.311	12.176	10.835
5.0	0.473	28.166	14.497	95.0	0.699	61.511	17.890	185.0	0.306	11.788	10.714
10.0	0.490	30.227	14.804	100.0	0.613	47.307	16.749	190.0	0.293	10.808	10.337
15.0	0.520	34.041	15.320	105.0	0.528	35.097	15.453	195.0	0.276	9.590	9.818
20.0	0.560	39.480	15.964	110.0	0.447	25.154	14.006	200.0	0.255	8.186	9.131
25.0	0.611	46.998	16.721	115.0	0.373	17.515	12.434	205.0	0.233	6.835	8.347
30.0	0.673	57.020	17.560	120.0	0.311	12.176	10.835	210.0	0.215	5.619	7.649
35.0	0.738	68.567	18.361	125.0	0.263	8.708	9.399	215.0	0.204	5.239	7.193
40.0	0.805	81.582	19.116	130.0	0.229	5.602	8.197	220.0	0.203	5.188	7.150
45.0	0.867	94.632	19.760	135.0	0.208	5.447	7.361	225.0	0.215	5.819	7.649
50.0	0.922	107.019	20.295	140.0	0.203	5.188	7.150	230.0	0.240	7.251	8.604
55.0	0.963	116.749	20.673	145.0	0.207	5.394	7.319	235.0	0.281	9.941	9.974
60.0	0.990	123.387	20.913	150.0	0.222	6.204	7.927	240.0	0.335	14.128	11.501
65.0	1.000	125.893	21.000	155.0	0.241	7.312	8.640	245.0	0.402	20.345	13.083
70.0	0.989	123.138	20.904	160.0	0.263	8.708	9.399	250.0	0.478	28.764	14.389
75.0	0.961	116.264	20.654	165.0	0.283	10.083	10.026	255.0	0.567	39.767	15.695
80.0	0.912	103.006	19.191	170.0	0.699	61.511	17.890	260.0	0.681	52.863	17.232
85.0	0.881	97.713	19.900	175.0	0.812	83.006	19.191	265.0	0.881	97.713	19.900
90.0	0.936	110.294	20.426	180.0	0.936	110.294	20.426	270.0	0.996	124.637	20.956
95.0	0.975	119.677	20.780	185.0	0.975	119.677	20.780	275.0	0.998	125.389	20.983
100.0	0.993	124.637	20.956	190.0	0.993	124.637	20.956	280.0	0.981	121.154	20.833
105.0	0.998	125.893	21.000	195.0	0.998	125.893	21.000	285.0	0.948	113.140	20.536
110.0	0.992	123.138	20.904	200.0	0.992	123.138	20.904	290.0	0.902	102.427	20.104
115.0	0.989	123.387	20.913	205.0	0.989	123.387	20.913	295.0	0.843	89.465	19.517
120.0	0.963	116.749	20.673	210.0	0.963	116.749	20.673	300.0	0.779	76.397	18.831
125.0	0.922	107.019	20.295	215.0	0.922	107.019	20.295	305.0	0.711	63.641	18.037
130.0	0.867	94.632	19.760	220.0	0.867	94.632	19.760	310.0	0.648	52.863	17.232
135.0	0.805	81.582	19.116	225.0	0.805	81.582	19.116	315.0	0.589	43.675	16.402
140.0	0.738	68.567	18.361	230.0	0.738	68.567	18.361	320.0	0.543	37.119	15.696
145.0	0.673	57.020	17.560	235.0	0.673	57.020	17.560	325.0	0.507	32.261	15.100
150.0	0.611	46.998	16.721	240.0	0.611	46.998	16.721	330.0	0.482	30.762	15.005
155.0	0.560	39.480	15.964	245.0	0.560	39.480	15.964	335.0	0.467	27.456	14.386
160.0	0.520	34.041	15.320	250.0	0.520	34.041	15.320	340.0	0.473	28.166	14.497
165.0	0.528	35.097	15.453	255.0	0.528	35.097	15.453	345.0	0.490	30.227	14.804
170.0	0.528	35.097	15.453	260.0	0.528	35.097	15.453	350.0	0.473	28.166	14.497
175.0	0.528	35.097	15.453	265.0	0.528	35.097	15.453	355.0	0.467	27.456	14.386
180.0	0.528	35.097	15.453	270.0	0.528	35.097	15.453	360.0	0.467	27.456	14.386

WES Broadcast Consultants.

DECLARATION

I, Pete E Myrl Warren, III, declare and state that I am a Certified Broadcast Engineer, by the National Association of Radio and Television Engineers, and my qualifications are a matter of record with the Federal Communications Commission, and that I am an engineer in the firm of WES Broadcast Consultants and that the firm has been retained to prepare an engineering statement on behalf of Pappas Telecasting of America, a California Limited Partnership.

All facts contained herein are true to my knowledge except where stated to be on information or belief, and as to those facts, I believe them to be true. All Exhibits were prepared by me or under my supervision. I declare under penalty of perjury that the foregoing is true and correct.



Pete E Myrl Warren, III

Executed on the 7th day of March 2002